

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE MACERICH PARTNERSHIP, LP, et al.,

Plaintiff(s),

v.

McCARTHY BUILDING COMPANIES, et al.,

Defendant(s)/Third-Party
Plaintiffs,

v.

PACIFIC ERECTORS, INC., et al.,

Third-Party Defendant(s).

NO. C03-2656P

ORDER ON THIRD-PARTY
DEFENDANT CADMAN, INC.'S
MOTION FOR CLARIFICATION OF
ORDER ON DEFENDANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT

The above-entitled Court, having received and reviewed:

1. Third-Party Defendant Cadman Inc.'s Motion for Clarification of Order on Defendants' Motion for Partial Summary Judgment
2. Plaintiff's Opposition to Cadman's Motion for Clarification
3. Cadman's Reply in Support of Motion for Clarification of Order on Defendants' Motion for Partial Summary Judgment
4. McCarthy Building Companies, Inc.'s and SDL Corporation's Reply in Support of Motion for Clarification of Order on Defendants' Motion for Partial Summary Judgment

and all exhibits and declarations attached thereto, makes the following ruling:

IT IS HEREBY ORDERED that, to the extent that the motion seeks the exclusion of the testimony of Plaintiff's expert Robert Englekirk, the motion is DENIED.

1 Third-Party Defendant Cadman, Inc. (“Cadman”) seeks “clarification” of this Court’s prior
2 order on their motion for partial summary judgment (Dkt. No. 133). In response to Cadman’s request
3 to exclude the testimony of Plaintiff’s expert Robert Englekirk, the Court ruled that Mr. Englekirk “is
4 qualified to testify on issues relating to the quality of concrete and the manner of its installation” and
5 that his testimony “will be limited to opinions previously disclosed by Mr. Englekirk.” Id. at p. 3.

6 “Clarification” is not the issue here: Cadman’s motion is essentially their third run at excluding
7 Englekirk’s testimony, this time on the basis that the opinions previously disclosed by this expert do
8 not satisfy the disclosure requirements of the Federal Rules of Civil Procedure.

9 To quote one of Cadman’s supporting authorities: “The test of a report is whether it was
10 sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated,
11 unnecessary depositions are avoided, and costs are reduced.” Reed v. Binder, 165 F.R.D. 424, 429
12 (D.N.J. 1996).

13 “Surprise” is not an issue here – Cadman has never claimed that Plaintiff failed to apprise them
14 of any essential evidence or opinions. The essence of Cadman’s motion is that Englekirk’s report is
15 insufficiently specific regarding both the nature of his concrete-related opinions and the nature of the
16 data upon which he relied to reach his conclusion to satisfy federal civil procedure and thus he should
17 not be allowed to testify about issues related to concrete.

18 The prior order settles the issue of Englekirk’s qualifications to testify as an expert on
19 concrete. His two-page report to Plaintiff (submitted on February 15, 1999 and included in the
20 materials initially provided to Defendants as part of expert disclosure) lists nine contributing factors to
21 the concrete cracking (and states his opinion: “As a direct consequence of these contributing factors, a
22 significant amount of cracking has occurred...”). That report further indicated that he had personally
23 visited the site as well as reviewed a report prepared by Walker Parking Consultants/ Engineers in
24 October, 1997. Additionally, his declaration filed in Plaintiff’s Reply to the Motion for Partial
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1 Summary Judgment contains additional materials upon which he relied, along with copies of some of
2 those reports as attachments.

3 To the extent that Defendants require further explication of the sources and nature of
4 Englekirk's opinions, they are free to conduct depositions during the discovery period. Cadman
5 appears to take the position that the expert report should be so detailed that no deposition is
6 necessary. There is no support for that argument in statute, case law or the realities of civil practice.
7 To say that the purpose of expert reports is to eliminate the need to depose witnesses overstates the
8 rationale for the rule reflected in the Reed opinion – "unnecessary" depositions are to be avoided, but
9 no authority has been cited that states that the need for expert depositions should be obviated
10 altogether. As Plaintiff's sole remaining expert, it is entirely appropriate that Englekirk be deposed
11 and the foundations for his opinions further explored during that proceeding.

12 Cadman's motion to exclude the testimony of Plaintiff's expert will be DENIED.

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15 The clerk is directed to provide copies of this order to all counsel of record.

16 Dated: December 21, 2005

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20 Marsha J. Pechman
21 U.S. District Judge
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